HEALTH CARE DECISIONS AND THIRD PARTIES

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Americans have a strong sense of independence and a shared belief that individuals should control their own destinies. Legislative bodies and courts in the United States have consistently reflected this by ensuring the right of citizens to determine what happens to them in medical matters. A dramatic example of enforcement of this right occurs when a health care provider is held criminally or civilly liable for battery after treating a patient without consent.[1] Although cases in which providers have been found legally responsible for battery are relatively rare, the existence of these cases underscores the value our society places on patient autonomy.

Certain clinical circumstances repeatedly occur where preserving patient autonomy may conflict with providing adequate medical care. Typical situations involve a patient who is not legally competent, such as a minor, or one who is temporarily unable to make health care decisions due to mental impairment from a head injury or intoxication. While noting at the outset that the pertinent law varies among jurisdictions,[2] the purpose of this article is to present problems and some thoughts regarding solutions in cases where patients require third parties to make health care decisions for them.

EMERGENCY CARE

An exception to the general rule that there must be consent to receive medical care arises when a patient receiving emergency care is unconscious, extremely disoriented or otherwise unable to articulate personal desires.[3] Since the law presumes that a person in danger of losing either life or limb without medical intervention would consent to care if able to do so, the health care provider may take appropriate therapeutic measures without explicit consent.

This is merely a presumption. If clear contrary evidence exists indicating that the person does not want a life sustaining intervention, then the provider must refrain from that intervention. Such evidence includes "living wills" as well as written instructions carried by members of religions that forbid specific types of medical treatment (e.g., use of blood products by Jehovah's Witnesses). Generally, a provider must comply with a valid document that purposefully limits the care that a person will receive.

The two following cases, which synopsize actual situations that occurred in recent years, illustrate some of these points.

MINORS

Case

A young male driver, age 17, was involved in a high speed motor vehicle accident that killed a passenger. Upon arrival to the emergency department, the patient's predominant medical problems were a pneumothorax, a compound fracture of the right lower extremity and compromised blood flow distal to the fracture. The patient was intubated and hemodynamically stabilized with intravenous fluids. Soon thereafter, it was determined that his right leg required amputation, necessitating an urgent blood transfusion.

The young man possessed a card clearly indicating that he was a Jehovah's Witness and must not be transfused. His parents insisted that blood products not be administered. Over their objections, the attending physician ordered the administration of enough units of packed red blood cells to stabilize the patient. While

this was occurring, child protective services was contacted. A temporary guardian, with the authority to make medical decisions, was subsequently established by court order.

Discussion

Although a parent has substantial control over a child's health care decisions, a parent may not intentionally endanger a child by failing to allow life and limb saving measures.[4] For instance, assume that the mother of the young man in this case also suffered injuries in the accident and, with the exception of the 17-year-old's minority, both were competent and suffering blood loss that likely would result in death. The mother's demands that she not be transfused must be followed regardless of the medical consequences. On the other hand, blood should be administered to the youth despite any pleas to the contrary. The law imposes a duty on a parent to protect a child's life. The failure of a parent to execute this duty creates a situation similar to one in which no one is available to consent, and the rules regarding an emergency apply.[5]

Most states have clearly delineated when a minor is considered emancipated. Generally, an individual under 18 years is emancipated when married, on active duty in the armed forces, over 16 and living away from home or by formal court order.[6] While some states consider females with children emancipated[7] to make their own medical decisions, many do not.

Some jurisdictions also deem certain types of care, particularly those critical to public health, accessible to an unemancipated minor without parental consent. In Texas, an unemancipated minor can seek treatment for alcohol and drug abuse, sexually transmitted diseases, birth control and inpatient mental health. In addition, a female under 18 can consent to all obstetrical services.[8] Interestingly, a 15-year-old can consent to a Caesarean section but not to surgical treatment of a long bone fracture. Moreover, due to a recent change in Texas law, a 15-year-old mother has authority over her child's health care decisions but not for many of her own.[9]

When parental consent is unavailable, most states allow relatives in a specified order of precedence to consent to routine care for a minor. A person appointed guardian by a court, or provided a power of attorney for health care by a parent, takes priority. If that person is not available, the typical order for providing authorization is as follows: grandparents, adult siblings, aunts and uncles, and cousins.[10] Other states simply allow any relative to act for the parent so long as it is reasonably in the child's best interest.[11] After the first person eligible to consent responds, a health care provider may not contact another should a preferred response not be given. In addition, when a relative of higher rank in the authorization scheme becomes available, that person will usually assume responsibility.

INCOMPETENT ADULTS

Case

A 27-year-old man sustained a single gunshot to the abdomen. He arrived at the emergency department awake and oriented with an operable airway, equal breath sounds in both lungs and no evidence of hemodynamic compromise. After reviewing the appropriate radiographs, the treating physicians believed that due to the immediate threat that the bullet posed to the great vessels, surgery was indicated. The patient was adequately informed of his condition and the benefits and risks of surgery. Despite the risk of death, the patient declared that he would prefer that risk over the risk of surgery.

Although the patient denied recent alcohol intake, his toxicology screen was notable for a blood alcohol level of 276 mg/dl and the presence of THC. Based primarily on these results, a determination was made that the

patient lacked the mental competency to fully comprehend his medical circumstances. An attempt was initiated to locate a responsible third party. In time, a pregnant woman who claimed to be the patient's common law wife was located. Perhaps surprisingly, this patient who was previously deemed incompetent was allowed to confirm that the woman was his common law wife.[12] She subsequently provided consent for surgery.

Discussion

Should a person become incompetent, a third party, related or not, may petition a court requesting that a guardian be appointed to care for the incompetent individual and manage his affairs. A court order takes precedence over any other authority, including those established by an individual or by statute. By virtue of Article IV of the United States Constitution which requires each state to give "full faith and credit" to legal acts performed in other states, court orders have effect across jurisdictions.

When a person has executed a durable power of attorney for health care that names a specific individual to make health care decisions, the specified person has rights superior to all others.[13] There may be limitations on the authority granted, such as not allowing the third party to consent to cancer chemotherapy. A health care provider must be aware of these limitations. Another concern, particularly when caring for patients referred from another state, is whether an instrument purporting to be a durable power of attorney is valid in the jurisdiction where it was executed as well as where care is being rendered. Finally, caution needs to be taken that the document is a power of attorney for health care and not merely a general power of attorney that does not confer the right to make health care decisions.

Several other considerations regarding a power of attorney for health care are worth noting. The law generally shields a health care provider who relies in good faith on a conferring document.[14] Unless otherwise stated on a conferring document, no expiration exists and its validity continues until modified or rescinded.[15] In addition, a person who has been given a power of attorney for health care may not delegate this power unless specified.

A number of states have enacted third party consent statutes that establish an automatic mechanism for health care decisions when no court order for guardianship exists and no other arrangements have been made. Before a law was passed in Texas several years ago, when an adult became incompetent without a durable power of attorney for health care, a court order for guardianship was required, and, until it was obtained, only emergency care could be received. Now, as for minors, a specified order of precedence to consent for routine care has been prescribed.[16] Many of the mechanical rules of securing third party consent for an incompetent adult are also similar to those for a minor.

Statutory restrictions may exist regarding treatments for which consent may be given. In Texas, a third party is prohibited from consenting to voluntary inpatient mental health care or electroconvulsive therapy.[17] By statute, a third party is not liable for the medical costs resulting from the consent they give.[18] Furthermore, neither a health care provider nor a third party are subject to criminal or civil liability for acts competently performed in good faith.[19]

Although arguably inconsistent, a person deemed legally incompetent from intoxicants who has insufficient capacity to make health care decisions may legitimately identify a family member. In the case of the intoxicated man with the abdominal gunshot wound, his statements were used to corroborate those made by his common law wife and not as the sole means of identification.

In situations where a patient suddenly or temporarily becomes incompetent, earlier expressed wishes may provide guidance and, if clear, must be followed.[20] Should a patient with severe emphysema express to her physician that mechanical ventilation must never be used and she later becomes disoriented from a stroke, mechanical ventilation is precluded as her pulmonary condition progressively worsens. In addition, after her desires are clearly expressed to health care providers, no third party may later override those desires.

CONCLUSION

In the two cases presented, hospital attorneys were quickly contacted enabling a favorable resolution of problematic medicolegal issues involving health care decisions and third parties. Health care providers must recognize when clinical circumstances requiring legal counsel arise and must seek appropriate assistance early. By so doing, they can focus on a more important concern—evaluating and treating their patients.

REFERENCES

1. *Schloendorf v. Society of New York Hospitals*, 105 N.E. 95 (N.Y. 1914).
2. For a good review see *Cruzan v. Missouri*, 497 U.S. 261 (1990).
3. *Shinn v. St. James Mercy Hospital*, 675 F Supp 94 (W.D. NY 1987).
4. *People ex. rel. Wallace v. Labrez*, 104 N.E. 2d 769 (ILL 1952); *Muhlenberg Hospital v. Patterson*, 320 A. 2d 518 (N.J. App. 1974).
5. See e.g. TEX. HEALTH & SAFETY CODE ANN. § 773.008 (West 1996).
6. See e.g. NEV. REV. STAT. ANN. ch. 129 (Miche 1993).
7. NEV. REV. STAT. ANN. § 129.030(1)(c) (Miche 1993).
8. TEX. FAM. CODE ANN. § 35.003 (West 1996).
9. TEX. FAM. CODE ANN. § 35.003(a)(6) (West 1996) provides that an unmarried minor parent who has actual custody of her biological child may consent to treatment for the child.
10. TEX. FAM. CODE ANN. § 35.01 (West 1996).
11. NEV. REV. STAT. ANN. § 129.40 (Miche 1993).
12. Texas is one of the few states that still recognize common law marriage. *Collara v. Navarro*, 574 S.W. 2d 65 (Tex. 1978).
13. See TEX. CIV. PRAC. & REM. CODE ANN. § 135.001 (West 1996).
14. *See id*.
15. *See id*. § 135.010.
16. TEX. HEALTH & SAFETY CODE ANN. § 313.004 (West 1996).
17. *See id*.
18. *See id*. § 313.006.
19. *See id*. § 313.007.
20. *Cruzan v. Missouri*, 497 U.S. 261 (1990).